

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF TOWNS OF AQUINNAH, BARNSTABLE,  
BOURNE, BREWSTER, CHATHAM, CHILMARK, DENNIS,  
EASTHAM, EDGARTOWN, FALMOUTH, HARWICH,  
MASHPEE, OAK BLUFFS, ORLEANS, PROVINCETOWN,  
SANDWICH, TISBURY, TRURO, WELLFLEET  
WEST TISBURY, AND YARMOUTH AND COUNTIES OF  
BARNSTABLE AND DUKES  
(acting as the CAPE LIGHT COMPACT) DTE 00-\_\_\_\_  
FOR CERTIFICATION OF ENERGY PLAN**

**COMPACT'S MEMORANDUM ON  
PROCEDURES TO CERTIFY ENERGY PLAN**

**INTRODUCTION**

The Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, and Yarmouth, and the counties of Barnstable and Dukes, acting together as the Cape Light Compact ("Compact"), have submitted to the Department of Telecommunications and Energy ("Department") their Energy Plan ("Plan") for certification, pursuant to G.L. c. 164, §134(b)("Section 134 (b)"). In conjunction with that filing, the Compact hereby submits this memorandum to outline the procedures it requests that the Department follow to certify the Plan. Section 134(b) provides, in relevant part:

[A] municipality or group of municipalities establishing a load aggregation program

pursuant to subsection (a) may, by vote of its town meeting or legislative body . . . adopt an energy plan which shall define the manner in which the municipality or group of municipalities may implement demand side management programs and renewable energy programs that are consistent with any state energy conservation goals . . . . After adoption of the energy plan . . . , the city or town clerk shall submit the plan to the department to certify that it is consistent with any such state energy conservation goals.

Section 134(b) does not specify the procedures the Department must follow to certify an energy plan. In Guidelines promulgated in DTE 98-100, the Department stated only that it "will review the Energy Efficiency Plans proposed by Municipal Aggregators consistent with G.L. c. 164, §134(b)." Final Guidelines, §6.3 (Department Review of Energy Efficiency Programs -- Municipal Energy Plans). The relevant energy efficiency regulations promulgated by the Division of Energy Resources ("DOER"), 225 C.M.R. 11.04, only require that a municipal aggregator must consult with DOER prior to filing its energy plan with Department. (The Compact has done so on numerous occasions.)<sup>(1)</sup> The Department has a wide range of discretion to determine the exact procedures that will apply to reviewing energy plans.

The Compact's Plan has been developed through a highly public process, including circulation of drafts, public hearings, and consultation with appointed and elected state and local officials. In each town, the Plan went before Town Meeting for final approval.<sup>(2)</sup> In determining the procedures it will follow, the Department should give due weight to the extensive public process that has already occurred. The Department should also consider that the governing statute, Section 134(b), and the Department's own Guidelines, §6.3, only require the Department to "certify" that the Plan is "consistent with" state energy conservation goals.

The Compact proposes below a certification process that complies with Section 134(b) and the Department's Guidelines.

#### **THE DEPARTMENT SHOULD CONDUCT AN EXPEDITIOUS REVIEW OF THE COMPACT'S ENERGY PLAN**

- **Expeditious Review Fosters the Legislative Goal of Allowing Municipalities to Administer Energy Efficiency Funds and Programs**

By adopting Section 134(b), the legislature has made the policy decision that the public will benefit if municipalities are allowed to administer energy efficiency programs using the funds collected under G.L. c. 25, §19. In the absence of legislative reauthorization, however, mandated funding for energy efficiency programs sunsets in the year 2002. *Id.* The Compact seeks an expeditious review of its Plan in order to begin implementing programs by July 1, 2001 and, thus, to operate those programs for at least eighteen months.<sup>(3)</sup>

Municipalities can provide significant contributions to the state energy conservation

goals articulated by DOER.<sup>(4)</sup> First, municipalities do not need to receive the financial incentives that utilities demand in order to run energy efficiency programs. See DTE 98-100, Final Guidelines, Section 5 ("Shareholder Incentives"). More money will be available for direct program services for customers. Second, municipalities are not concerned about "lost base revenues" ("LBR") from reduced energy sales, which can act as disincentives for utilities to promote energy efficiency. *See, e.g., Fitchburg Gas and Electric Light Company*, DTE 98-48-Phase I (November 5, 1999), at 7 (Fitchburg stated "if LBR recovery were not allowed, [it] would redesign" its energy programs in ways inconsistent with Restructuring Act). Third, municipalities can use their extensive local networks and outreach methods to increase overall program participation, including outreach through town halls, use of newsletters already being sent to citizens, use of existing alliances with social service organizations and trade allies, etc. This will promote the market transformation process that is one of the DOER's goals for energy efficiency programs.<sup>(5)</sup> Fourth, energy conservation is one of the primary goals of the twenty-one municipalities that formed the Cape Light Compact, as written into the "Intergovernmental Agreement" under which the Compact operates.<sup>(6)</sup> This goal is especially important to the Compact and customers in its territory because electricity prices on the Cape and Vineyard remain among the highest in the New England region.

- **The Department Need Not Conduct Full-Blown Adjudicatory Proceedings**

The Compact, when it filed for approval of its Aggregation Plan, suggested that the Department need not conduct full-blown adjudicatory hearings in proceedings under Section 134. The Department in fact reviewed and approved the Aggregation Plan without holding formal evidentiary hearings, although the Department itself served discovery requests and allowed interested parties to file comments. DTE 00-47. The Department noted:

G.L. c. 164, §134(a) does not prescribe a specific process that the Department must follow in conducting its review and approval of a municipal aggregation plan. The Department's discretion to determine the style and scope of a proceeding is clearly established.

DTE 00-47, at 5 (citing *Cablevision Systems Corp. v. DTE*, 428 Mass. 436, 439 (1998)). This holding applies equally to the Department's review of a municipal energy plan, for which Section 134(b) prescribes no specific process.

In exercising its discretion to determine the procedures that will apply in this case, the Department should bear in mind that the funds for energy efficiency program derive from a systems benefit charge imposed under G.L. c. 25, 19.<sup>(7)</sup> The funds come from the ratepayers and, in effect, are held in trust for ratepayers, for the purpose of implementing energy

efficiency programs. The charges, varying from 2.5 mills to 3.3 mills over the period 1998 to 2002, are not part of the payments that customers make to utilities for providing distribution service. Thus, the local distribution company (Commonwealth Electric Company, in the case of the Cape Light Compact) has no vested property right to these funds. Even less so do providers of energy efficiency services, distribution companies serving other service territories, and other non-governmental parties have any cognizable legal interest in how the Department rules on a proposed Energy Plan. While these entities have may be "interested" in the lay sense of the term, their legal interest is quite attenuated and the Department should establish its procedures with this in mind.

Massachusetts statutes (G.L. c. 30A, §§10, 11) and the Department's own regulations

only grant "parties" rights to participate in adjudicatory proceedings before the Department.

The Department's regulations (220 C.M.R. 1.03(2)) limit the definition of "party" to:

(i) "the specifically named persons whose legal rights, duties or privileges are being determined in the adjudicatory proceeding;" (ii) "any other person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding;" and (iii) "any other person allowed by the Department to intervene as a party."

Under this definition, few persons or entities will be able to show that they are legally entitled to "party" status in this proceeding.

Section 134(b) embodies the legislature's determination that municipalities, as well as distribution companies, will now be allowed to administer energy efficiency funds. The Department is only required to "certify" that a municipal energy plan is consistent with state energy conservation goals and that the proposed programs are cost-effective. Nothing in Section 134(b) or in the Department's own Guidelines promulgated in DTE 98-100 mandates that interested persons can insist on formal adjudicatory proceedings in connection with the Department's review of an energy plan.

The Compact suggests the following procedures for review and certification of its Plan:

1. The Department expeditiously issues a Notice of Filing/Notice of Public Hearing, setting a public hearing date within the Compact's service

territory at which any person can offer comments.

2. If deemed necessary, Department staff conducts discovery of the Compact's filing, seeking documents or written explanations of the filing.

3. The Compact responds to the Department's discovery and inquiries.

4. To the extent that the public hearings and discovery identify issues that require further comment, the Department allows for submission of final written comments.

5. The Department issues its certification decision.

The case law clearly supports the Compact's position that interventions in this proceeding can and should be limited. *See Robinson v. DPU*, 835 F.2d 19, 22 (1<sup>st</sup> Cir. 1987) ("The S.J.C. has held over and over again that under this statute [G.L. c. 30A, §10(4)], the D.P.U. has broad discretion to limit intervention."); *Cablevision Systems Corp. v. DTE*, 428 Mass. 436, 439 (1998); *Wilmington v. DPU*, 340 Mass. 432, 436-437 (1960) ("Plainly the town does not" fall within the category of "specifically named persons" with a right to participate in the adjudicatory proceedings); *Attorney General v. DPU*, 390 Mass. 208, 217 (1983) ("a residential customer alleging no particular damage to himself" does not have constitutional or statutory standing to intervene as of right). The reasoning of these cases should especially apply here because the legislature has already determined that municipal aggregators may administer energy efficiency funds collected under G.L. c. 25, §19.

### **SUGGESTED SCHEDULE**

The Compact suggests the following schedule, consistent with its comments:

Day 1: Initial filing by Compact

Day 2: Beginning date for discovery by Department

Day 8: Department issues Notice of Filing/Notice of Public Hearing

Day 16: End date for discovery by Department

Day 23: Compact answers Department's discovery by this date (or sooner)

Day 30 (or earlier): Public hearing

Day 40: Final comments due, from Compact and interested persons

Day 45: Reply comments (if necessary)

Day 90: Final order.

### **CONCLUSION**

The Compact urges the Department to adopt procedures that allow the Compact to begin implementing energy efficiency programs by July 1, 2001. The Compact developed its Plan after a highly public process that included input from state agencies, elected municipal officials and citizens throughout its service territory. The Plan has received formal, favorable votes from nineteen Town Meetings and the support of the Division of Energy Resources.<sup>(8)</sup>

The Compact respectfully asks the Department to expeditiously review and certify the Plan as consistent with state energy conservation goals.

Dated: December 4, 2000

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1. DOER's supporting Guidelines (§2.3.3) provide, in relevant part: "After consultation and review of an EEP with a municipal aggregator regarding the aggregator's proposed plan, as provided in 2.2.1, DOER may issue an opinion with the DTE, as it deems necessary or appropriate."
2. The two exceptions are Orleans and Provincetown, which will take their votes in February and April of 2001, respectively.
3. Should the legislature extend the funding authorization, the Compact expects to continue administering the energy efficiency funds.
4. See "Guidelines Supporting the Massachusetts Division of Energy Resources' Energy Efficiency Oversight and Coordination Regulation 225 CMR 11.00," Table 1, for those goals.
5. See n. 4 for reference to DOER's energy conservation goals.
6. The Compact filed the Intergovernmental Agreement in DTE 00-47 (Vol. II, Tab 1). Article I of the Agreement lists the Compact's goals, including "to utilize and encourage demand side management and other forms of energy efficiency through contract provisions and state mandated system benefit charges for renewable energy."
7. In *Shea v. Boston Edison Company*, 431 Mass. 251 (2000), the Court rejected a challenge that these charges amount to an unconstitutional excise tax.
8. In a November 16, 2000 letter to the Compact, DOER stated its opinion that "the Compact's Energy Plan is wholly consistent with state energy conservation goals."